Supreme Court, U.S.
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No. 94-503

In The

Supreme Court of the United States

October Term, 1994

KENNETH D. HENEGAR,

Petitioner,

v.

WILLIAM M. BANTA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT WILLIAM M. BANTA IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner has identified the following as the question presented for review:

> "Whether the Sixth Circuit Court of Appeals' opinion, decided and filed June 21, 1994, is in direct conflict with this Court's *Hawaiian Airlines, Inc. v. Finazzo* [sic – *Norris*] opinion, decided June 20, 1994?"

As set forth in this Brief, this case in fact presents no issue meriting Supreme Court review.

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BRIEF OF RESPONDENT WILLIAM M. BANTA IN OPPOSITION

This case, which was decided upon *two* independently sufficient grounds, presents no issue of national importance, represents no conflict among the circuits, and concerns matters which were either not raised below or which relate to matters of state law.

In seeking review, petitioner addresses only one of the two separate grounds upon which the Sixth Circuit affirmed the district court's decision, and ignores at least three separate additional state law grounds supporting the Court's holding. Because the question presented is not outcome determinative in this case, and because a decision of such little consequence simply does not merit

Supreme Court review, respondent William M. Banta ("Banta") respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari is substantially inaccurate and contains numerous misstatements and omissions of material facts. Pursuant to Rule 15.1, the correct statement of the case, based upon the evidence and pleadings introduced before the district court, is as follows:

A. The Parties

Petitioner Kenneth Henegar ("Henegar") was employed as a brakeman by the Norfolk and Western Railway Company. He was covered under a collective bargaining agreement between the United Transportation Union and the railroad. Banta was Henegar's supervisor.

B. The Collective Bargaining Agreement

The company's safety rules, promulgated pursuant to the collective bargaining agreement, required that employees sustaining personal injuries report them promptly to their immediate supervisors. Those same work rules obligated supervisors to report the facts through the appropriate company channels. The agreement also required a formal hearing before the imposition of discipline and further required, pursuant to the Railway Labor Act, 45 U.S.C. Sections 151 *et seq.* ("RLA"),

that any disputes be submitted to final and binding grievance arbitration.

C. Henegar Complains Of A Hernia

Henegar contended below that on February 4, 1991, he began to suffer stomach pains while working at a switching yard in Milan, Michigan. Henegar went to the hospital where, he claims, he was told that he had an umbilical hernia. The hospital records however, reflected that Henegar had been aware of the hernia for many months. Banta met Henegar at the hospital and drove him back to the rail yard. Banta later testified that Henegar told him in the car that he had long been aware that he had had a hernia requiring surgical repair, but was fearful of having an operation.

D. Henegar Claims That His Hernia Was Work-Related

Henegar filed an injury claim alleging that his hernia was work-related. On March 15, 1991, he gave a statement to a railroad claims agent in which he asserted that he had not known about his hernia before February 4.

E. Henegar Is Charged Under The Labor Agreement With Providing False And Conflicting Statements

Upon learning of Henegar's statements to the claims agent, Banta formally charged him under the collective bargaining agreement with having provided false and conflicting statements concerning his alleged injury. The

railroad scheduled a disciplinary hearing under the terms of the collective bargaining agreement to investigate the claim.

The Hearing Officer scheduled the hearing for March 28, 1991 in Michigan. Henegar's union local chairman represented him. During the hearing, Banta testified that Henegar had told him that he had been aware of the hernia for at least one year before February 4, and had been postponing surgery recommended by his physician. The railroad also introduced Henegar's hospital records, which similarly reflected that he had long been aware of the hernia.

F. The Hearing Officer Discharges Henegar And A Public Law Board Affirms That Decision

Presented with this evidence, the Hearing Officer concluded that Henegar had provided false and conflicting statements concerning his alleged injury. More specifically, the Hearing Officer found that Henegar's claim that he had suffered a personal injury at work was inconsistent with the hospital records and his statements to Banta in the car, both of which indicated that the injury did not occur at work. Based upon that finding, the Hearing Officer dismissed Henegar from service.

Henegar, through his Union, appealed that decision to a Public Law Board. On October 11, 1991, after reviewing the hospital records and transcript of the hearing, the Public Law Board affirmed the decision dismissing Henegar.

G. Henegar Brings Suit For Slander

Henegar brought suit against Banta on March 13, 1992. In the Complaint and Amended Complaint, Henegar rested his claim solely upon testimony at the hearing itself and referred only to slander rather than libel.

The District Court granted summary judgment in Banta's favor on the grounds that the claim was pre-empted under the RLA. In reaching that conclusion, the District Court employed the same test "used by the Supreme Court in cases under § 301 of the Labor Management Relations Act." Appendix B-5, citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

The Sixth Circuit affirmed. It first concluded that the claims were preempted under the RLA. The Court also found, as a separate, independently sufficient ground, that the claims would also have been preempted under this Court's test for Section 301 cases, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

REASONS FOR DENYING THE WRIT

Petitioner posits an issue before this Court which addresses only one of two alternative holdings. Moreover, the Court below not only affirmed the District Court's decision based upon two separate grounds, but at least three *additional* independent grounds under state law would also have dictated in the same result. Further, because the District Court and the Sixth Circuit have

already considered this case under the standard petitioner advocates, there is no good reason for yet another review.

A. The Issue For Which Review Is Sought Is Not Dispositive Because The Claims Were Found To Be Preempted Under *Lingle* And The RLA

The RLA requires the submission of any disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of [collective bargaining agreements]" to special resolution mechanisms. 45 U.S.C. § 153 First (i). As interpreted by this Court, the Act's grievance mechanisms are "a mandatory, exclusive and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 38 (1963).

Employee grievances growing out of the interpretation or application of collective bargaining agreements are termed "minor disputes" under the RLA. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Consolidated Rail Corp. v. Railway Labor Exec. Ass'n*, 491 U.S. 299, 302-03 (1989). The resolution of minor disputes is within the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") and of public law boards. *See Andrews*, 406 U.S. at 325; *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978); 45 U.S.C. § 153 Second. The RLA's policy of channeling dispute resolution to either the NRAB or the public law boards is to prevent "[t]he exercise of state power over an area of activity specifically relegated to the railway act dispute resolution

process." *McCall v. Chesapeake & Ohio Railway Co.*, 844 F.2d 294, 301-02 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988).

The RLA preempts state law claims arising out of minor disputes, no matter how characterized. *Andrews*, 406 U.S. at 323-24. Courts have viewed attempts to disguise minor disputes as state law claims as "end runs around the Railway Labor Act's policy of channeling employment disputes to arbitration." *Leu v. Norfolk & Western Railway Co.*, 820 F.2d 825, 831 (7th Cir. 1987). If an employee's purported state law claim is in reality a minor dispute or an attempt to circumvent the Act's mandatory procedures, it is preempted by the RLA and must be dismissed. *Andrews*, 406 U.S. at 323-24. The RLA's mechanisms, prescribed not by contract but by statute, preempt a wide variety of employment related claims.

In both *Lueck* and *Lingle*, the Court recognized that where an employee's claim requires reference to the terms of the collective bargaining agreement, it is preempted by federal law. *Lingle*, 486 U.S. at 405-06; *Lueck*, 471 U.S. at 220; *see also, IBEW v. Hechler*, 481 U.S. 851, 861-62 (1987) (Section 301 preempts tort claim requiring reference to the collective bargaining agreement to determine the appropriate duty of care). In this case, as both lower courts found, Henegar's claim was not independent of the labor agreement, did in fact require reference to the terms of that agreement, and was therefore preempted under that standard.

1. The Accusation Was One Under The Collective Bargaining Agreement

At the outset, the alleged slander consisted of an accusation of providing false and conflicting statements under work rules promulgated pursuant to the collective bargaining agreement. Both the reasonableness and truthfulness of Banta's statements must be measured against the collective bargaining agreement and its terms. The hearing itself, where the alleged slander occurred, was required by the labor contract and the hearing's procedures were spelled out in its provisions. This claim has a firm contractual nexus.

2. The Contract Would Have To Be Examined To Determine The Existence Of A Prima Facie Case Of Slander

More importantly, as the Sixth Circuit found, a prima facie case of slander under Michigan law requires that the plaintiff prove the existence of an "unprivileged publication." *New Franklin Enterprises v. Sabo*, 192 Mich. App. 219, 480 N.W.2d 326, 328 (1991). To determine whether Banta's statements at the hearing were "unprivileged," a finder of fact would have to look to the terms of the collective bargaining agreement to consider the circumstances under which the statements were made.

In this case, of course, the hearing itself was mandated not only by the RLA, but by the very terms of the collective bargaining agreement. Moreover, the challenging of eyewitnesses' testimony as slanderous is clearly a collateral attack on the minor dispute mechanisms and on the adverse judgment of the public law board. The same

collective bargaining agreement obligated the railroad to provide witnesses, such as Banta, to testify regarding Henegar's conduct giving rise to the violation. To establish a prima facie case of slander against Banta under Michigan law, therefore, Henegar had to introduce evidence of the terms of the collective bargaining agreement. *See also Lueck*, 471 U.S. at 218 n.12 (bad faith claim preempted because it required analysis of how benefit claims were handled under the contract).

3. The Evaluation Of Banta's Defenses Required Reference To The Contract

Banta's potential defenses also required reference to the terms of the collective bargaining agreement. First, to consider a defense based upon an absolute privilege under Michigan law, the Court would have to review the terms of the collective bargaining agreement to determine Banta's interest in testifying, as well as the circumstances under which he was testifying. Indeed, Banta asserted defenses based upon absolute and qualified privileges, both of which would require an examination of the circumstances under which the statements were made and, therefore, also the terms of the collective bargaining agreement as they related to the hearing itself.

Banta also asserted defenses based upon collateral estoppel under Michigan law. This defense again would require reference to the collective bargaining agreement to determine the circumstances under which the Public Law Board found against Henegar, and whether its finding as to the truthfulness of Banta's statements would be given issue-preclusive effect. Since the underlying claim,

Henegar's prima facie case, and consideration of Banta's many defenses under state law all required reference to the terms of the collective bargaining agreement, *Lingle* dictated the conclusion, as the Sixth Circuit found, that Henegar's claims were preempted.

B. Three Separate State Grounds Existed To Affirm The Court's Holding

In addition to the straightforward application of *Lingle*, three separate state law grounds existed for the affirmance of the decision below.

1. Any Claims Based Upon Prehearing Statements Would Be Time-Barred Under State Law

At the outset, in an effort to persuade this Court to accept review, Henegar has attempted to broaden his Complaint beyond its scope to assert that Henegar somehow defamed him in a written notice *before* the arbitration hearing. No such allegation, however, was made in the Complaint or Amended Complaint, which referred only to slander, not libel.

Of equal importance, any such claim would have been barred by the state statute of limitations. The alleged prehearing statements were made in February, 1991. This action was not filed until March 13, 1992, and any such statements were made more than one year prior to the filing of suit. Under the laws of Michigan, where the alleged slander occurred, and Ohio, where this case was filed, the statute of limitations for a claim of libel or slander is only one year. *See* Mich. Comp. Laws

§ 600.5805(7)) (Mich. Stat. Ann. § 27A.5805(7)); Ohio Rev. Code § 2305.11(A). In both states, the limitations period begins to run at the time of publication. *Hawkins v. Justin*, 109 Mich. App. 743, 311 N.W.2d 465 (1981); *Guccione v. Hustler*, 64 Ohio Misc. 59, 413 N.E.2d 860 (1978). Any attempt, therefore, to broaden this case beyond the hearing, apart from being outside of the scope of the Complaint, would be time-barred.

2. Henegar's Claims Were Barred By An Absolute Privilege Under State Law

Henegar's claims were also barred under Michigan law because the statements made at the hearing were absolutely privileged. *Fulghum v. United Parcel Service, Inc.*, 424 Mich. 89, 378 N.W.2d 472, 477 (1985) (Levin, J., concurring) (statements made during grievance proceedings are absolutely privileged); *Mendicki v. General Motors Corp.*, 367 F.2d 66 (10th Cir. 1966) (same).

3. Henegar's Claims Were Barred By The Doctrine Of Collateral Estoppel Under State Law

Further, the claims were barred, under Michigan law, by the doctrine of collateral estoppel since the Public Law Board concluded, after an evidentiary hearing, that Henegar had, in fact, provided false statements to the railroad. *See Fulghum v. United Parcel Service, Inc.*, 130 Mich. App. 375, 243 N.W.2d 559 (1983) (decision of arbitration hearing has collateral estoppel effect) *aff'd*, 424 Mich. 89, 378 N.W.2d 472 (1985); *Corey v. New York Stock*

Exchange, 493 F. Supp. 51, 56-57 (W.D. Mich. 1980) (decision in securities arbitration must be given collateral estoppel effect in subsequent defamation action), *aff'd*, 691 F.2d 1205, 1213 (6th Cir. 1982) (characterizing such a claim as "an impermissible collateral attack"). Since there was one alternative federal ground for the Sixth Circuit's holding and three separate state grounds, there is no need for Supreme Court review.

C. The Application Of *Lingle* To This Dispute Would Not Change The Outcome

Although Henegar makes much of this Court's opinion in *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994), that decision contributes little to this controversy. The Sixth Circuit has already received briefs, has considered, and has decided this case under the standard dictated by that opinion and by *Lingle*. The District Court decided the case under the standard articulated in *Lueck*.

Moreover, nothing in *Hawaiian Airlines* touches upon the other independently sufficient grounds raised by Banta below, including the application of the state law statute of limitations, the existence of a state law absolute privilege, and the assertion of collateral estoppel under Michigan law. Similarly, the sole other federal appellate court since *Lingle* deciding the issue raised in this case, the preemption of a defamation claim arising from statements made during the course of a grievance procedure, reached precisely the same conclusion. *See Shane v. Greyhound Lines*, 868 F.2d 1057, 1063 (9th Cir. 1989).

CONCLUSION

This case does not merit Supreme Court review. The decision in *Hawaiian Airlines* only addresses which of two standards apply, the one articulated for Section 301 cases or the one used by some lower courts under the RLA. The District Court decided the case under the Section 301 standard set forth by this Court in *Lueck*. The Sixth Circuit decided the matter under both standards, and concluded that the case satisfied neither. Since neither standard was satisfied, and since this case was fully briefed, argued, thoughtfully considered, and decided by the Court of Appeals, there is no reason for further review.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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